No. 10131 2

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROSE B. LARSON, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

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CITATIONS

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OPINION BELOW

The opinion of the Board of Tax Appeals entered July 24, 1941 (R. 46–68), is reported in 44 B. T. A. 1094.

JURISDICTION

This review involves a claimed deficiency of $69,243.49 in income tax of Rose B. Larson for the year 1934. (R. 68.) The Commissioner's deficiency letter was issued January 27, 1937 (R. 14), and the taxpayer's petition to the Board of Tax Appeals was filed April 23, 1937, within the period allowed by Section 272 (a) (1) of the Internal Revenue Code. This review is taken from the Board's order of redetermina-

tion entered November 13, 1941, allowing a deficiency of $52.91. (R. 68.) The petition for review was filed February 2, 1942 (R. 69–80), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code. The transcript of record was filed May 8, 1942 (R. 269), within the time allowed by this Court (R. 3).

QUESTION PRESENTED

Whether, under Sections 22 and 162 of the Revenue Act of 1934, income taxes are due from the taxpayer on interest, rents, dividends and profits derived from her one-half of the community property involved in her deceased husband's estate.

STATUTES INVOLVED

The provisions of the statutes involved are set forth in the Appendix, *infra,* pp. 26–28.

STATEMENT

The Commissioner determined an income tax deficiency due from the taxpayer for the calendar year 1934 in the sum of $69,243.49, based upon additional income, which with minor adjustments aggregated $145,396.99. (R. 21.) The Board determined a deficiency of $52.91. (R. 68.) The evidence before and the findings of the Board chiefly relate to the question whether certain income is taxable to this taxpayer, or to the executor of her deceased husband's estate. Such income consists of items of interest, rentals, dividends and profits from the sale of 85,000 shares of stock of the Sunshine Mining Company. (R. 46–47.)

The Board's findings (R. 48–59) are as follows:

Rose B. Larson, the taxpayer, a resident of Yakima, Washington, is the surviving wife of Adelbert E. Larson, hereinafter referred to as the decedent, who died testate on June 7, 1934. Under the decedent's will, executed May 31, 1934, the Yakima First National Bank of Yakima, Washington, hereinafter referred to as the executor, was appointed executor. (R. 48, 213.)

On June 13, 1934, the decedent's will was admitted to probate and the bank duly qualified as executor. The executor employed a firm of attorneys to attend to legal matters arising in connection with the estate. At the request of the taxpayer the executor also employed Shirley D. Parker, the taxpayer's son, at a salary of $1,000 a month, to perform services relating to administration of the estate. (R. 48.)

Under date of June 14, 1934, the taxpayer, as surviving wife of the decedent, petitioned the court, sitting in probate, for a widow's allowance of $5,000 cash and $1,500 monthly. (R. 48, 49.) The petition stated, among other things (R. 48–49):

> That no inventory and appraisement has yet been made, but that the value of said estate, consisting of the community property of the decedent and your petitioner, is approximately $1,500,000.00.

The petition was allowed. (R 49.)

At the time of the decedent's death all the real and personal property owned by the taxpayer and the decedent was community property. The value of this property, including the interest of the taxpayer

as appraised by duly appointed appraisers of the decedent's estate, was $2,353,480.79. Included in the community property of the taxpayer and decedent were 210,974 shares of stock of the Sunshine Mining Company. (R. 49.)

The decedent's will provided for legacies aggregating $482,000 and named the taxpayer residuary legatee. It also provided (R. 49):

> Seventeenth: The executor of my estate shall have three years if necessary to liquidate enough property to pay all of the above bequests.

Claims filed against the decedent's estate totaled $112,140.51. (R. 50.)

At the time of his death the decedent was president of the Sunshine Mining Company. Prior to his death a plan had been discussed with regard to listing the stock of the Sunshine Mining Company on the New York Curb Exchange. The plan had for its purpose the enhancing of the value of the mining company's stock. After the decedent's death the plan was again considered. It was initiated by Carl M. Stolle of Grande, Stolle & Company, who was associated with Walter Seligman of New York City, the owner of a large block of stock in the Sunshine Mining Company. (R. 50.)

Mr. Stolle approached the president of the bank in regard to the participation of the estate of the decedent in the listing plan and stated that a certain number of shares would have to be optioned and sold by the four majority shareholders of the mining company in order that the plan might be a success. The

shares which Stolle wished to purchase and obtain options to purchase amounted to approximately 40% of the total shares held by the four shareholders. The shareholders who were asked to participate in the plan were Alexander Miller and his wife, Mrs. N. P. Hull, J. B. Cox, and the decedent's estate. (R. 50.)

On June 30, 1934, the executor of the decedent's estate entered into five option agreements covering a total of 70,000 shares of Sunshine Mining Company stock. The option agreements were identical, with the exception of the number of shares covered thereby. (R. 50–51.) The provisions of these agreements were as follows (R. 51–52):

> For and in consideration of the sum of One and No/100 Dollars ($1.00) paid by Grande, Stolle & Company, a Washington corporation, to the Yakima First National Bank, a corporation, as the duly appointed, qualified and acting executor of the estate of A. E. Larson, deceased, receipt of which is hereby acknowledged, the undersigned, said executor, does hereby give and grant unto said Grande, Stolle & Company, a corporation, an option and right to purchase 10,000 shares of capital stock of the Sunshine Mining Company in the sum of $7.00 per share.
>
> * * * * *
>
> The said undersigned does further agree to deposit said stock, to wit, 10,000 shares, in escrow with the Yakima First National Bank at Yakima, Washington, with instructions to said bank to surrender all or any portion thereof to Grande, Stolle & Company, a corporation, upon its payment to said bank for the account of

> said Yakima First National Bank, a corporation, as executor, the purchase price per share above set out, the expense of said escrow to be borne by Grande, Stolle & Company, a corporation.
>
> * * * * *

Each of the option agreements was accompanied by a letter of escrow instructions. There were seven certificates of stock for various numbers of shares aggregating 70,000. These certificates, together with option agreements and escrow instructions, were deposited with the Yakima First National Bank in escrow on June 30, 1934. Similar option agreements were entered into between Grande, Stolle & Company and the other three majority shareholders. (R. 53.)

The taxpayer and her son, Shirley D. Parker, left for a trip to California on June 14, 1934, and did not return to Yakima until about the middle of July, 1934. Neither the taxpayer nor her son knew of the option transactions until after their return from California. Upon her return from California in July 1934, the taxpayer requested that all matters affecting her interest in decedent's estate be handled by Parker. (R. 53–54.)

Mr. Parker was advised of the options granted by the executor. On July 26, 1934, with Parker's consent and approval, the executor petitioned the probate court for authority to grant options to purchase the 70,000 shares of stock (which the executor had already optioned) and to sell immediately 10,000 shares of that stock. In its petition the executor stated (R. 54):

> that it is necessary that some part of the personal property of said estate be sold to pay the specific bequests provided in the will herein, and that your petitioner believes that said offer of the Grande, Stolle & Company is the best offer that could be received for a portion of said stock in the Sunshine Mining Company; * * *.

On the same date the court entered its order authorizing such action. (R. 54.)

On July 31, 1934, the executor petitioned the court for authority to sell to Grande, Stolle & Company 5,000 shares of Sunshine Mining Company stock in addition to the 10,000 shares already authorized to be sold. On the same date the court entered an order containing the following provisions (R. 55):

> Now, therefore, it is ordered that the executor be and it is hereby authorized to sell 15,000 shares of stock of the Sunshine Mining Company for the net price of $5.82½ per share; and
>
> It is further ordered that this order shall supersede the order made on the 26th day of July, 1934, insofar as the sale of 10,000 shares of stock *were* concerned, but shall have no effect upon the order permitting the executor to grant an option to said Grande, Stolle & Company for the sale of 70,000 additional shares.

On August 2, 1934, the estate received the sum of $87,375 from the sale of 15,000 shares of stock of the Sunshine Mining Company. The 70,000 shares covered by the five option agreements were sold at intervals throughout the year 1934, the estate receiving therefor a total sum of $483,000. The shares sold

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under the options were those represented by the certificates enumerated in the option agreements. (R. 55.)

Neither the taxpayer nor Mr. Parker ever gave permission to sell any of the taxpayer's one-half interest in the community property belonging to the estate of the decedent and the taxpayer. There was no understanding that taxpayer's one-half interest was affected by the stock sales. (R. 55–56.)

Under date of May 1, 1935, the executor of decedent's estate filed with the probate court a petition for partial distribution, stating as follows (R. 56):

> 1.
>
> That the final report of your petitioner as executor herein is on file and that such final report, together with the inventory shows that included within the estate herein was a total of 210,974 shares of capital stock of Sunshine Mining Company, a corporation, of which a total of 85,000 shares have been sold, leaving in the possession of the executor, your petitioner herein, shares to the number of 125,974, of which said shares Rose B. Larson, as surviving spouse, is the owner of 105,487.
>
> 2.
>
> That the said Rose B. Larson, as surviving spouse, desires to have distributed to her 15,000 shares of said stock and that your petitioner, therefore, prays for an order of the court permitting and authorizing it to distribute to the said Rose B. Larson forthwith, 15,000 shares of stock of Sunshine Mining Company.

On the same date the court entered an order containing the following provisions (R. 57):

> * * * it appearing to the court that included within the assets of the above entitled estate was an aggregate of 210,974 shares of the capital stock of the Sunshine Mining Company and that all of said property was community property of the decedent and Rose B. Larson, his widow, and
>
> It further appearing that said Rose B. Larson is entitled, as her share of the community property, to receive from said executor, upon the closing of said estate, a total of 105,487 shares, and no good reason appearing why a partial distribution should not at this time be made.
>
> Now, therefore, it is ordered that the Executor herein be and it is hereby authorized and directed to distribute to said Rose B. Larson 15,000 shares of the Sunshine Mining Company, a corporation.

On July 2, 1934, the estate of the decedent received a dividend of $3,600 from the Surety Finance Company of Yakima, Washington. In her income tax return for the year 1934 the taxpayer included the sum of $1,570 representing one-half the sum of $3,140, the amount of the dividend which had accrued at the date of death of the decedent. (R. 57.)

On December 19, 1934, the board of directors of the Surety Finance Company declared a dividend payable on December 31, 1934. A check in the sum of $3,600, payable to the order of decedent's estate, was issued December 31, 1934, in payment of dividends

on stock of the Surety Finance Company held by the estate. The check cleared through the bank on January 2, 1935. In the notice of deficiency the Commissioner treated this payment as received December 31, 1934, and increased the taxpayer's gross income for the taxable year 1934 by $1,800. (R. 57–58.)

In his notice of deficiency relating to the taxpayer's income tax for the year 1934 the Commissioner added to the taxpayer's gross income $2,374.68, representing one-half of the interest on obligations held by the community which was received by decedent's estate during the period from June 7 to December 31, 1934; the sum of $9,782.49 representing one-half of rentals of community property received by the decedent's estate; the sum of $33,453.64 representing one-half the amount of dividends from community property stock received by the estate of the decedent from June 7 to December 31, 1934; and $95,904.77 as profit on the sale of assets. (R. 21, 58.)

The estate of the decedent was under administration throughout the taxable year 1934. The taxpayer kept her accounts and filed her returns on the cash basis. (R. 59.)

STATEMENT OF POINTS TO BE URGED

The Board erred in failing to hold and decide that the taxpayer is subject to income taxes upon all of the interests, rents, dividends and profits derived from her one-half of the community property involved in her deceased husband's estate.

SUMMARY OF ARGUMENT

The taxpayer, as the survivor, had a vested one-half interest in the community property involved in her deceased husband's estate, subject only to community debts, which were negligible in comparison with the size of the estate. The executor had a right to possession of all property, but a right to receive the "rents and profits" of the realty only. Most of the income involved herein, consisting of interests, rents, dividends and stock profits, came from the personalty. The husband's estate owned only one-half of the property, and was liable for income taxes on only one-half of the income from the property. The taxpayer herein owned the other half of such property and should be held liable for taxes on the income therefrom. The community status remained fixed, and was not disturbed by the pendency of the estate. The taxpayer had a right to her share of the income as it accrued, since there was no claim against such income for community debts. The income-tax deficiency is a debt due from the taxpayer and is not collectible from the estate.

The Board's decision is not in accordance with its prior decisions in similar cases. The record clearly shows that the community shares of stock were sold, resulting in the profits sought to be taxed, and the Board's finding that only the stock of the estate was sold is not supported by the substantial evidence in the case, or in accordance with the community-property ownership. The taxpayer had the beneficial use of some of this income, during the taxable year, and

should be taxed accordingly, on an annual basis, in accordance with the requirements of the revenue laws.

ARGUMENT

The taxpayer is subject to income taxes upon the interest, rents, dividends and profits derived from her one-half of the community property involved in her deceased husband's estate

The record is clear that all of the property, both real and personal, involved herein, was community property of the taxpayer and her husband. (R. 49.) As shown by the statement, *supra,* there were various substantial holdings of real and personal property in which this taxpayer had the usual one-half interest based upon the community property rights in the State of Washington. The record shows that this property produced the income, the main question involved herein being whether such income is taxable entirely to the estate, as held by the Board, or to the estate and this taxpayer, in accordance with her community-property rights and interest in the property.

The taxpayer apparently conceded that "she had a vested interest in the property", but contended that "she was not entitled to its income during the period of administration". (R. 60.) The Board held, as it stated (R. 62) that "the entire income on community property during the period of administration is receivable by the estate" and hence taxable to the estate. The Commissioner contends that this decision is erroneous with respect to all of the various classes of income stated above and enumerated in the statement of points relied upon for review. (R. 83–87.)

Section 22 of the Revenue Act of 1934 (Appendix, *infra*) specifically provides that gross income includes "profits * * * interest, rent, dividends * * *". When such income is community income, in Washington, one-half of it is taxable to the wife. *Poe* v. *Seaborn,* 282 U. S. 10.

The pertinent Washington statutes are set forth in full, in so far as pertinent, in the Appendix, *infra.* Section 6892 of Remington's Revised Statutes of Washington provides that property not acquired or owned as separate property which is "acquired after marriage by either husband or wife, or both, is community property".

Section 1342 of the same statutes (Appendix, *infra*) provides in part:

> Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. * * *

Section 1464 of the statutes (Appendix, *infra*) provides, in part, that every executor shall—

> * * * have a right to the immediate possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, * * *

Section 1465 (Appendix, *infra*) requires the executor or administrator to make an inventory of "all of the property of the estate which shall have come into his hands * * *".

It is well established, of course, that the wife has a vested one-half interest in community property and is entitled to report one-half of the income from such property in her separate return, notwithstanding that such property is subject to the husband's management and control during his lifetime. *Poe* v. *Seaborn,* 282 U. S. 101; *Warburton* v. *White,* 176 U. S. 484. On the death of the husband only his half of the community property is includable in the gross taxable estate for federal estate tax purposes (*Lang* v. *Commissioner,* 304 U. S. 264); likewise as to state inheritance taxes (*In re Coffey's Estate,* 195 Wash. 379). In the *Coffey* case the court stated (pp. 385–386):

> * * * since the premiums were paid with community funds, the wife had an undivided one-half interest in the policies. Only the husband's one-half interest therein may be included in his gross estate * * *.

This interest of the wife has been termed a "sacred" right (*Guye* v. *Guye,* 63 Wash. 340, 342) and protected from loss by her husband's bill of sale (*In re McGovern's Estate,* 181 Wash. 231) or change of beneficiary of life insurance proceeds (*Occidental Life Ins. Co.* v. *Powers,* 192 Wash. 475). In the *Occidental Life Ins. Co.* case *supra,* the court stated (pp. 484–485):

> In this state, as stated in those cases, and as has always been stated by this court, the wife has a vested property right in the community property equal with that of her husband *and in the income of the community,* including salaries or wages of either husband or wife, or both. [Italics supplied.]

In re Binge's Estate, 5 Wash. (2d) 446, involved separate property as against a claim that it was community property. The court there stated the general rule as to "status" as follows (p. 484):

> It is the rule in this state that the status of property, whether real or personal, becomes fixed as of the date of its purchase or acquisition; and that the status, when once fixed, retains its character until changed by agreement of the parties or operation of law.

In the instant case the status has not been changed by any agreement of the parties; and we are unable to find that there has been any change by operation of law.

In the case of *In re Gulstine's Estate,* 166 Wash. 325, the court held that where a ranch was in part community and in part separate estate, the funds constituting *net income* from the land should be carried over into the distribution in the same proportions. It stated (p. 334):

> We hold that the title to the ranch is three-elevenths the separate estate of the deceased, and eight-elevenths community estate, and that the separate interest should be carried over into the distribution of the accrued net profits which have arisen from the property.

Generally, of course, income taxation follows ownership and rights thereof. *Helvering* v. *Clifford,* 309 U. S. 331; *Blair* v. *Commissioner,* 300 U. S. 5; *Burnet* v. *Leininger,* 285 U. S. 136; *Poe* v. *Seaborn, supra.* Income taxes have been allocated accordingly to a surviving wife and her husband's estate, in accordance

with their community and separate interests in property producing the income in the State of Washington. *Compton* v. *Commissioner,* 11 B. T. A. 26.

Drumheller v. *Commissioner,* 27 B. T. A. 209, petition for review dismissed, 65 F. (2d) 1013 (C. C. A. 9th), arose in Washington and involved taxation of dividends to the surviving husband or to the wife's estate. The Board held, as it stated (p. 213):

> * * * half of the community income should be taxable to the petitioner, and the other half to the estate of his deceased wife.

We believe that this decision is more in accordance with the Washington law than the Board's decision herein.

It is apparent that one of the effects of the Board's decision will necessarily require an attempt to saddle the estate with the taxes otherwise due from the surviving spouse. Shifting of such tax liability is not in accordance with the settled law of Washington that this cannot be done as to other liabilities. For instance, federal estate taxes must be deducted from the part of the estate inherited, and not from the community state as a whole. *Wittwer* v. *Pemberton,* 188 Wash. 72. In that case the court stated (p. 79):

> Since, for the purpose of determining liability for Federal income taxes, the community income was reported in two equal parts, one as belonging to the wife and the other to the husband, it would seem to follow that the personal liability for the tax would be several, and that collection by distraint could be had only in severalty against the half interest of each spouse in the community estate. * * *

The decedent's estate only is liable for his separate debt (*In re McHugh's Estate,* 165 Wash. 123, 124), or tort (*Bortle* v. *Osborne,* 155 Wash. 585). In the *Bortle* case, *supra,* the court stated (p. 589):

> By the community property law of this state * * * the legislature did not create an entity or a juristic person separate and apart from the spouses composing the marital community.

See also *Huyvaerts* v. *Roedtz,* 105 Wash. 657, 659; *Schramm* v. *Steele,* 97 Wash. 309, 315–316.

As shown above, Section 1342 of the Washington statutes provides that upon death of the other spouse, "one-half of the community property shall go to the survivor, subject to the community debts * * *". The "one-half", in fact, goes where it has always been. And it seems clear that the words "subject to" are used in their usual sense, i. e., affected by, exposed to, liable for, in the contingency of, or to qualify something substantial and already created. *White* v. *Hopkins,* 51 F. (2d) 159, 163 (C. C. A. 5th); *Brown's Estate,* 289 Pa. 101. A transfer, "subject to" an existing agreement, gives the transferee the benefits as well as the disadvantages of the agreement. *Bacon* v. *Grossman,* 71 App. Div. (N. Y.) 574, 578. This does not mean that, in the instant case, title, or even equitable ownership, is disturbed, or lost. During the husband's lifetime, the wife's vested half interest in the community property, as well as the husband's half interest, was subject to community debts, and the husband had full management and control. Upon his death the wife's half interest, as well as the husband's

half, continued to be subject to community debts until the estate was fully administered. Yet the Board holds that the wife is not taxable, though the executor has only a degree of the control formerly exercised by her husband when she was taxable. *Poe* v. *Seaborn, supra.*[1]

The Court's attention is particularly invited to the provisions of Section 1464 of the Washington statutes, *supra.* It recognizes the executor's "right to the immediate possession" of all the real and personal estate of the decedent, and then provides that he "may receive the rents and profits of the real estate * * *". In view of Section 1342, it is questionable to what extent that provision applies in so far as community property is concerned, but in any case we think it clear that the executor merely collects the income for convenience and the wife is not thereby deprived of her interest in it. In the instant case, as shown above, most of the income, consisting of interest, rents, dividends and stock profits, is from personalty. Substantial dividends were paid upon all of the Sunshine Mining Company stock involved herein. (R. 211.) It would seem to be clear that in the absence of any assertion of any claim for community debts,[2] the ex-

[1] The wife might have applied for authority to administer the community property separately, but as far as the record shows she did not do so. Section 1419, Remington's Revised Statutes of Washington.

[2] No consideration was given to selling assets to pay debts. (R. 117.) All claims aggregated about $100,000 (R. 114–115, 226), as against an estate of $2,353,480.79 (R. 49), and at least $50,-106.83 of the claims apparently was for "administration". *In re Thomas' Estate*, 140 Wash. 296.

ecutor had no right whatever to any of this income. The taxpayer's real rights to her community property, and the income therefrom, therefore were not disturbed. Section 6898 of the Washington statutes (Appendix, *infra*) specifically requires that the community property laws be "liberally construed". The executor had merely the same right to collect income and use it for paying community debts as the husband had during his lifetime. There is no merit to the contention that she is not taxable because she did not actually receive the rents. She was taxable during her husband's lifetime on one-half of all rents, irrespective of whether or not she received any part of them. She is taxable in the same way after his death.

It should be noted, moreover, that the debts and charges against the estate were only about $50,000 (See footnote 2, *supra*), (R. 49, 114–115, 226), so that the wife's half interest was not in fact absorbed by the debts.

Thatcher v. *Capeca,* 75 Wash. 249, held that a surviving husband, without proper administration or authorization of any probate court, could and did give a valid deed to his interest in certain realty, and that his right to the property was complete as soon as the expenses of administration were paid. The court stated (pp. 253–254):

> Upon the death of Catherine Stetson, one-half of the property went to him in his own right, subject only to the community debts, and the expenses of the administration. When these were satisfied, his title to the one-half became absolute, and he was then entitled to

> have such portion segregated from the portion of the heirs and set apart to him.

Griffin v. *Warburton,* 23 Wash. 231, held that where all the debts and expenses of administration had been satisfied, and the administrator and heirs agreed to abandon the probate proceedings, the title to the realty there involved became absolute in the surviving husband immediately upon the death of his wife, and was valid in the hands of a subsequent transferee. In showing that the administration was only to satisfy valid claims against the estate, and that when such claims were satisfied the estate was fully administered, the court stated (p. 238):

> When the claims of creditors are paid or barred, and the costs and charges of administration are satisfied, the estate is for all practical purposes fully administered upon, the right of possession in the administrator terminates, and the right of the heirs to the residue of the estate in his hands becomes absolute. The heirs are then entitled to have this residue delivered over to them as their own property, under the law; and it is made the duty of the administrator, by the statute, to surrender the property to them. This duty they can enforce by obtaining a decree of the court directing its performance. As such a decree, however, neither creates their title, nor their right of possession, to the property, a distribution made without it cannot be invalid.

Likewise, herein, there is little reason for the view that the taxpayer's income and tax liability have in some manner been shifted to the estate—which is not liable for her debts. It is feared that the Board's

decision enables her to avoid her just taxes, even though, in a large measure, through the above-mentioned "advances" she apparently enjoyed the use of much of this income during the taxable year. Income taxes, of course, must be levied on an annual basis (*Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359) and may be "realized" even though not directly received (*Helvering* v. *Horst,* 311 U. S. 112).

We believe that *Barbour* v. *Commissioner,* 89 F. (2d) 474 (C. C. A. 5th), on which the Board relies (R. 62), is distinguishable. It arose under a different statutory scheme, in Texas, where the executor held "all such common property * * * in trust".[3] Moreover, the court in that case stated (p. 476) that "When and if Mrs. Barbour receives this profit from the executors she should, of course, account for and pay the taxes on it". In the instant case the taxpayer did receive at least some of the money in question as a dividend and some "advances" in the total sum of $28,674.90, the exact nature of which is not clear from the record. (R. 191–192, 213, 219.)

The decisions of the Supreme Court of Washington relied upon by the Board (R. 62) do not go far enough to indicate that the taxpayer herein is not taxable upon her half of the community property. *Stanton* v. *Everett Trust & Savings Bank,* 145 Wash. 165, merely held that an heir of a wife is not entitled to

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[3] Vernon's Texas Statutes (1936), Article 3630, provides:

Property held by Executor.—Until such partition is applied for and made, the executor or administrator of the deceased shall recover possession of all such common property and hold the same in trust for the benefit of the creditors and others entitled thereto.

separate administration upon her interests, but must seek relief in a pending administration of the husband's estate. The court there, at page 169, speaks of administration "upon the community *property of the spouses*" in one proceeding. [Italics supplied.] *Crowe & Co.* v. *Adkinson Const. Co.,* 67 Wash. 420, chiefly dealt with the requirement of filing claims against the estate, and does not directly support the Board's decision herein.[4] *In re Guye's Estate,* 54 Wash. 264, also relied upon by the Board (R. 62), merely held that the deceased, rather than his wife, could name the executors to administer the estate. *Ryan* v. *Fergusson,* 3 Wash. 356, also was a different case, involving a court sale of mortgaged property.

The remaining issue is whether or not one-half of the profit derived from the sale of 85,000 shares of stock of the Sunshine Mining Company by the executor was taxable to this taxpayer. She contended and the Board held that the sale in question was a sale of shares belonging exclusively to the estate. (R. 62–63.) The principal basis of the Board's holding was that, since the shares aggregated 210,974 and the court's final order stated that 85,000 had been sold, leaving 125,974 of which the surviving spouse was the owner of 105,487, it must necessarily be concluded that the husband's shares rather than the wife's were sold.

We submit that this conclusion is untenable. The taxpayer was residuary legatee under her husband's

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[4] The court there stated (pp. 424–425):

> The respondent further contends that the lien is enforceable against the undivided one-half of the property owned by the widow. This view is not sound.

will as well as the owner of a one-half interest in the community property. The order of the probate court authorizing the sale of the stock shows that both the executor and this taxpayer, as the surviving widow and residuary legatee, applied for such authority, in 1934. (R. 154–155.) The final order of the court, which was not entered until May 1, 1935, did not state that the 105,487 shares represented her community interest in 210,974 shares, but that she as surviving spouse was entitled to that many shares. It therefore authorized distribution to her of 15,000 shares. (R. 157–158.) Part of these may have been received as residuary legatee, and the order authorizing the sales did not state whether shares belonging to the husband or wife were being sold. There had not previously been any division of the shares. All were in the executor's possession. Inasmuch as the wife owned a one-half interest in each share of stock, the sale in the absence of any division was necessarily a sale of the shares as community property in which the wife had a one-half interest. The Board's opinion that the order of the probate court is conclusive, and that the case is governed by *Helvering* v. *Rhodes,* 117 F. (2d) 509 (C. C. A. 8th) (R. 66), therefore is erroneous. That order did not determine the issue in this proceeding. See *Tooley* v. *Commissioner,* 121 F. (2d) 350 (C. C. A. 9th). Cf. *In re Larson's Estate,* 200 Wash. 318.[5]

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[5] In that case the taxpayer sued the executor and others for alleged unjust enrichment with respect to the sale of these identical shares of stock, and failed, the court holding (p. 337) that she acted with full knowledge of the facts.

We submit further that there is no substantial evidence in support of the Board's finding (R. 55–56) that neither the taxpayer nor Mr. Parker (the taxpayer's agent) gave permission to sell any of the taxpayer's one-half interest in the community property belonging to the estate of the decedent and the taxpayer, and that there was no understanding that the taxpayer's one-half interest was affected by the stock sales. The son, Mr. Parker, gave his approval to the sale. He was his mother's agent and in talking with Stolle no distinction was made between the decedent's interest and hers. He was selling the community property.

Both Robert M. Hardy, the representative of the estate, and Carl M. Stolle, who was interested in purchasing the shares, testified that it made no difference to the purchaser whose stock was being sold. (R. 107, 111, 112.) Mr. Stolle testified that he talked to Mr. Parker and did not distinguish between the sale of any interest of Mrs. Larson and the sale of any interest of the decedent in the stock. He said that he wanted approximately 40% of the various holdings of this stock for trading purposes; that he wanted 80,000 shares "from the Larson interests" and ultimately this was increased to 85,000 shares; and that it made no difference to him "whether it came out of Mr. or Mrs. Larson's half". (R. 137.) Nat U. Brown, attorney for the estate, also testified that no consideration was given to the matter of whose stock was being sold as between Mrs. Larson's interest and the estate's interest. (R. 112, 114.)

It therefore seems clear that there was not, in fact, any segregation or distribution of stock of the estate for sale, but that the community shares were sold, and that the profits should be taxed to both owners accordingly. In view of the clear evidence of the wife's ownership, as set forth above, which the Board seems to have overlooked, the Board's findings are not supported by the substantial evidence in the case. Neither are the findings and conclusion in accordance with the evidence and the law. The Board failed to give full consideration to the taxpayer's ownership and her knowledge of and participation in the sales of the community stock, through her agent (R. 53–54, 115, 153, 154, 259), resulting in the profits which should be partly taxed to her.

CONCLUSION

It is therefore respectfully submitted that the petition for review should be granted and the decision of the Board reversed.

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JULY 1942.

APPENDIX

Revenue Act of 1934, C. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

* * * * *

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see section 142.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same

basis as in the case of an individual, except that—

* * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

Remington's Revised Statutes of Washington:

§ 1342. *Descent of community property.* Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivors to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

§ 1464. *Right to possession and management.* Every executor or administrator shall, after having qualified, by giving bond as hereinbefore provided, have a right to the immediate posses-

sion of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the court, to the heirs or devisees, and shall keep in tenantable repair all houses, buildings and fixtures thereon, which are under his control.

§ 1465. *Inventory of estate—Appraisement.* Every executor or administrator shall make and return upon oath into the court, within one month after his appointment, a true inventory of all of the property of the estate which shall have come into his hands, and within thirty days after filing such inventory he shall make application to the court to appoint three disinterested persons to appraise the property so inventoried, and it shall be the duty of the court to appoint such appraisers. * * *

§ 6892. *Community property defined—Husband's control of personalty.* Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

§ 6898. *Liberal construction.* The rule of common law that statutes in derogation thereof are to be strictly construed has no application to this chapter. This chapter establishes the law of the state respecting the subject to which it relates; and its provisions and all proceedings under it shall be liberally construed with a view to effect its object.

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